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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73-1440, 73-1441, 73-1442

MCBRYDE SUGAR COMPANY, LIMITED, and
OLOKELE SUGAR COMPANY, LIMITED, *Appellants,*

vs.

STATE OF HAWAII, et al., *Appellees.*

SELWYN A. ROBINSON, et al., *Petitioners,*

vs.

STATE OF HAWAII, et al., *Respondents.*

IDA ALBARADO, et al., *Petitioners,*

vs.

STATE OF HAWAII, et al., *Respondents.*

On Appeal from the Supreme Court of the State of Hawaii and Petitions for Writ of Certiorari to the Supreme Court of the State of Hawaii

MOTION TO DISMISS APPEAL FROM THE SUPREME COURT OF HAWAII

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Appellee-Respondent, State of Hawaii, moves this Honorable Court to dismiss the appeal herein on the following grounds:

(1) The Federal questions sought to be reviewed were neither timely nor properly raised nor expressly passed on by the Courts of Hawaii.

(2) The appeal does not present a substantial Federal question.

STATEMENT

In 1959, the present suit was instituted by McBryde Sugar Company, Limited ("McBryde") pursuant to Part III, Chapter 664, Hawaii Revised Statutes, to adjudicate the ownership of all waters of the Hanapepe Valley basin.

At the hearing before the trial Court, appellants and petitioners did not raise any Federal Constitutional questions, and the trial Court, on December 10, 1968, made a determination of the water rights of the landowners.[1] Although the trial court noted that diversions of water had occurred, the Court did not reach the legality of such diversions.[2]

Separate appeals to the Supreme Court of Hawaii were filed by McBryde, Gay & Robinson and the State of Hawaii, but no Federal Constitutional questions were presented. The issues involved were questions

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[1]All reference to appendix made herein refers to "Joint Appendix to Jurisdictional Statement and Petitions for Writs of Certiorari" submitted on behalf of Appellants and Petitioners. Decision (App. 4); Conclusions of Law No. 13 (App. 55-57).

[2]Decision, Findings 11 and 15 (App. 7, 8-9); Finding 30 (App. 13).

concerning the rights of landowners to appurtenant, riparian and surplus waters.

The brief of appellant McBryde Sugar Company, Limited, in the Supreme Court stated the questions as follows:

"QUESTIONS PRESENTED

1. Under Hawaiian law, what is the standard for determining lands entitled to ancient appurtenant water rights?
2. Can lands used for taro cultivation from time immemorial be denied an ancient appurtenant water right because they were not actually under taro cultivation on the date of the Land Commission Award, where there has been no proof of abandonment of the immemorial right and no proof of prescriptive use of those waters by others?
3. What lands, in addition to those found by the trial court to have ancient appurtenant water rights, are entitled to such a water right and, conversely, what lands held by the trial court to be entitled to ancient appurtenant rights are not so entitled?
4. What is the proper measure of the water duty of lands having ancient appurtenant rights in this case?
5. Is it proper to reduce the water duty of each acre of taro land found by the trial court to have an ancient appurtenant water right based upon usage of such lands for the cultivation of taro at the time of the Land Commission Awards by one-third to allow for either: (a) the fact that other lands, watered

by Hawaiian custom from time immemorial, were not actually in cultivation (that is, were fallow) at the time of the Land Commission Awards; or (b) for the fact that, in the opinion of the trial court, at least one-third of the very lands of the trial court had held were entitled to an ancient appurtenant water right were at all times lying fallow at the time of the Land Commission Awards (probably because of the decline in population at that time)?

6. Are prescriptive water rights to the flow of a stream to be measured only as of the driest five days in the whole fourteen-year three-month prescriptive period, or are such rights to be measured in normal dry weather flow conditions, and also at other flow conditions of the stream, based upon the actual proof of prescriptive usage at various river flow states over the entire prescriptive period?

7. What additional prescriptive water rights of McBryde should be awarded at each flow stage of the Hanapepe River?

8. Were certain of the water flow, diversion, and measurement figures adopted by the trial court erroneous?

9. Did the trial court err in refusing to follow the rule of *Carter v. Territory,* 24 Haw. 47 (1917) regarding the rights of owners of ahupuaas or ilis kupono along a stream to share in the storm and freshet waters of the stream pursuant to the doctrine of riparian rights and in refusing to award McBryde its riparian rights in the storm and freshet waters of Hanapepe stream?

10. Under the record in this case, what is the dividing line between the normal daily surplus flow of the stream (owned by G&R) and the storm and freshet surplus flow of the stream (to be shared by G&R, the State and McBryde)?
11. If this court decides to overrule *Carter v. Territory,* what rule of law should be established for surplus waters?"

The brief of Gay & Robinson stated the questions on appeal as follows:

"QUESTIONS PRESENTED

1. Did McBryde, by taking water belonging to the State and other land owners, for a 10-year period acquire a prescriptive right to take the water which G&R was entitled to and in fact continued to take during the 10-year period?
2. Did the circuit judge err in enjoining G&R from diverting an unascertained quantity of water contrary to HRCP 65(d)?
3. Did the circuit judge err by making a double allowance for ditch losses allowing each owner of appurtenant water rights to take 50,050 gpapd (gallons per acre per day) measured at any point along or at the end of the ditches as well as at the point the ditches divert water from the river, when the court had already increased the rights of these owners 15% to allow for the losses in ditches in arriving at the figure of 50,050 gpapd?"

The brief of the State of Hawaii stated the questions on appeal as follows:

"STATEMENT OF THE QUESTIONS INVOLVED

1. What is the quantum of proof necessary to show that certain lands were in taro cultivation since time immemorial and as such are entitled to appurtenant water rights?
2. What is the quantity of water necessary to raise taro as it was done in ancient time as measured in gallons per acre per day?
3. Where land is claimed to be ancient taro land which is entitled to appurtenant water right, what is the critical period that such land must have been in taro culture in order that the water right may become vested?
4. Where land owned by the king in ancient time was in taro culture, is it necessary that such land be in taro culture at the time that adjoining taro lands were granted under Land Commission Awards, in order that such sovereign land be vested with appurtenant water rights?
5. Is there a distinction between normal surplus water and storm and freshet water? Assuming that there is a distinction, is the law the same on the ownership thereof?"

The opinion of the Supreme Court of Hawaii entered on January 10, 1973, with one Justice dissenting, does not mention, discuss or pass upon any Federal question.

Petitions for rehearing were filed by McBryde and by Gay & Robinson. A "Motion for Partial Vacation of Opinion and for Opportunity to Present Evidence and Argument" was also filed by Olokele Sugar Company, Limited.

On June 18, 1973, the Supreme Court of Hawaii entered an order directing McBryde, Gay & Robinson, the State of Hawaii and the Small Owners to file briefs limited to the issues as follows:[3]

"1. The pertinent portion of HRS §7-1, which was first enacted on August 6, 1850, Laws 1850, and which has been in our statute books ever since, reads:

'The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided, that this shall not be applicable to wells and water-courses, which individuals have made for their own use.'

Is the foregoing statute material to the determination of the water rights of the parties in this case? If so, why, if not, why?

2. The parties in this action introduced evidence as the record shows, to show that parcels of land in the Hanapepe Valley were entitled to appurtenant water rights for raising taro at the time of the Mahele or the Land Commission Award. The trial court found certain parcels were entitled to appurtenant water rights. Under what principle or theory of law are the owners entitled to apply the appurtenant water rights to parcels of land other than that to which the court found the right was appurtenant?"

On June 29, 1973, Olokele was also ordered by the Court to file a brief directed to the same issues.

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[3]Order of June 18, 1973 (App. 108-109).

Oral argument was duly held limited to the issues specified in the order of June 18, 1973. On December 20, 1973, a *per curiam* affirmation of its prior opinion entered on January 10, 1973, was entered by a majority of the Supreme Court finding "no reason to change the decision filed herein."[4] The *per curiam* affirmation of the Supreme Court does not mention, discuss or pass upon any Federal questions.

QUESTIONS PRESENTED

1) Where federal constitutional questions are neither timely nor properly raised in proceedings to determine the rights of landowners to appurtenant, riparian, and surplus waters, and the Supreme Court of Hawaii does not pass on any federal question, does the jurisdiction of the United States Supreme Court attach on appeal from the state judgment?

2) Where the Supreme Court of Hawaii makes a determination of the rights of landowners to appurtenant, riparian and all surplus waters by construing for the first time a state statute and its decision is made upon a fair and substantial basis, does the jurisdiction of the Supreme Court of the United States attach on appeal from the state judgment?

3) Where a state statute involves the "rights of the people" to appurtenant, riparian and surplus waters, and the sole issue before the state courts is a determination of such water rights, is there a substantial federal constitutional question involved?

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[4] 55 Haw. at 260 (App. 114).

ARGUMENTS

I.

QUESTIONS WHICH APPELLANTS AND PETITIONERS SEEK TO HAVE REVIEWED WERE NEITHER PROPERLY RAISED NOR PRESENTED BELOW NOR DECIDED UPON BY THE SUPREME COURT OF HAWAII

In order for this Court to vindicate its jurisdiction to deal with the federal questions in this case, if any, this Court must inquire whether those questions were presented to the Supreme Court of Hawaii in such a manner that it was necessarily decided by the State Supreme Court when it affirmed its prior decision of January 10, 1973. If the questions were not so presented, then this Court has no power to consider it. See, *Bailey v. Anderson,* 326 U.S. 203, 206-207 (1945). Moreover, this Court has stated that when, as here, the highest State Court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the State Courts, unless the aggrieved party can affirmatively show the contrary. See, *Bailey v. Anderson,* supra; *Chicago I. & L. R. Co. v. McGuire,* 196 U.S. 128, 131-133 (1905).

In the separate appeals to the Supreme Court of Hawaii taken by McBryde, Gay & Robinson and the State of Hawaii, no Federal constitutional questions were raised. The issues involved were solely questions concerning the rights of landowners to appurtenant, riparian, and surplus waters.

Subsequent to the decision of the State Supreme Court on January 10, 1973, both appellants and peti-

tioners filed petitions for rehearing. However, in their petitions and briefs, although appellants and petitioners challenged the application of Hawaii Revised Statutes §7-1 to the determination of the water rights, at no time did they draw in question the validity and constitutionality of the statute itself. The opinion of the Supreme Court of Hawaii construes the applicability of Hawaii Revised Statutes §7-1 to the determination of the water rights of landowners; the opinion does not indicate that the State statute was drawn in question as being repugnant to the Constitution, nor does it appear from the opinion that a federal question was presented to or considered by the Court. Thus, even if this Court should find that federal questions were properly raised below, this appeal should be dismissed for failure of appellants and petitioners to explicitly attack the validity and constitutionality of the State statute and not merely its applicability. See *Charleston Fed. S. &. Assn. v. Alderson,* 324 U.S. 182, 187 (1945).

Assuming *arguendo,* that federal questions were properly raised below, appellants and petitioners were not deprived of their constitutional right to a hearing pursuant to the Due Process Clause of the 14th Amendment.

Pursuant to the order of the Supreme Court of Hawaii entered on June 18, 1973, all parties to the action were directed to file briefs concerning (1) whether Hawaii Revised Statutes §7-1 is material to the determination of the water rights of the parties, and (2) under what principle or theory of law are

the landowners entitled to transport water. Appellants and petitioners were provided the opportunity to argue the validity and constitutionality of the State statute both in their briefs and upon oral argument. However, both appellants and petitioners chose to argue the applicability of Hawaii Revised Statutes §7-1 rather than its validity and constitutionality.

II.

THE DECISION OF THE SUPREME COURT OF HAWAII IS CLEARLY CORRECT AND NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED IN THIS APPEAL AS TO REQUIRE PLENARY CONSIDERATION

The Supreme Court of Hawaii, prior to rendering its opinion of January 10, 1973, reflected back to the time of the Great Mahele of 1848 and reviewed its past decisions rendered in *Peck v. Bailey,* 8 Haw. 658 (1867); *Haw. Com. & Sugar Co. v. Wailuku Sug. Co.,* 15 Haw. 675 (1904); *Carter v. Territory,* 24 Haw. 47 (1917); and *Territory v. Gay,* 31 Haw. 376 (1930). The Court also reviewed the Principles of the Land Commission, Stat. L. Kamehameha III 81 (1847), prior to making a determination of the rights of the people to appurtenant, riparian, and surplus waters. The appurtenant water rights determined by the Court are synonymous with the ancient water rights which attached to *kalo* (taro) land measured by the quantum of water necessary to cultivate taro under the ancient system of taro cultivation.

In rendering its opinion, the State Supreme Court acknowledged the importance of their decision stating:

> "This court, like the United States Supreme Court has 'rejected a doctrine of disability at self-correction.' Helvering v. Hallock, [309 U. S. 106, 121 (1940)]. We believe that the doctrine of stare decisis is subordinate to legal reasons and justice and we should not be unduly hesitant to overrule a former decision when to do so would bring about what is considered manifest justice . . ."[5]

The Supreme Court of Hawaii for the first time construed Hawaii Revised Statutes §7-1 in determining the rights of the parties to appurtenant, riparian, and all surplus waters and clearly defined water right laws which were in the shaded area as the result of *Territory v. Gay,* 31 Haw. 376 (1930), where the three Justices differed on the law.

In *Patterson v. McCormick,* 99 S.E. 401, 405 (1919), the Supreme Court of North Carolina was faced with construction of a will which could have been decided adversely to the plaintiffs were it not for a statute which changed the common law. The Court there stated:

> "Where the statute is explicit and has been overlooked, the doctrine of stare decisis does not apply . . . when the statute and the precedents conflict the statute controls. The Courts cannot by a line of erroneous decisions overrule the statute."

A state has the power to determine its own peculiar rules of property rights in waters within its boundaries by statutes and Court decisions. In *Erie Railroad*

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[5]Decision of January 10, 1973 (App. 72).

Co. v. Tompkins, 304 U.S. 64, 78 (1938), the Court stated:

> "Except in matters governed by the federal constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by the Legislature in a statute or by its highest court in a decision is not a matter of federal concern."

Since a determination of property rights is a matter of local concern, the decision of the Supreme Court of Hawaii in construing Hawaii Revised Statutes §7-1 should not be overturned. The decision of the Court is rendered upon a fair and substantial basis and no federal questions are presented as to require plenary consideration by this Honorable Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this appeal be dismissed.

Dated, Honolulu, Hawaii,
May 23, 1974.

Respectfully submitted,
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